FILED BY CLERK
JUL 10 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STEVEN DAVID MORAN, Plaintiff/Appellant, v. THE CITY OF TOMBSTONE, a political subdivision of the State of Arizona, Defendant/Appellee.	2 CA-CV 2008-0004 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV 2006-00010

Honorable Charles A. Irwin, Judge

AFFIRMED

Patrick K. Greene — Tombstone
Attorney for Plaintiff/Appellant

Humphrey & Petersen
By Marshall Humphrey III, Andrew J. Petersen, and Ryan S. Andrus — Tucson
Attorneys for Defendant/Appellee

P E L A N D E R, Chief Judge.

¶1 In this personal injury action, plaintiff/appellant Steven Moran argues the trial court erred in granting summary judgment in favor of defendant/appellee, the City of Tombstone (City). He contends a trier of fact could find that the City was grossly negligent in failing to revoke a permit it had issued to Blue Sky Ranch (Blue Sky) to provide horseback rides in the city after discovering Blue Sky's insurance coverage had lapsed. Finding no error, we affirm.

Background

¶2 "On appeal from a grant of summary judgment, we view all facts and reasonable inferences therefrom in the light most favorable to the party against whom judgment was entered."[1] *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 2, 965 P.2d 47, 49 (App. 1998). Blue Sky sold horseback trail rides for tourists and operated under an animal use permit issued by the City. On January 8, 2005, one of Blue Sky's horses was being led down a city street when it became frightened, broke away from its handler, and trampled Moran, severely injuring him.

¶3 The City's code provided that "[n]o permit shall be issued or remain in effect unless the permittee . . . procures, and maintain[s] in force and on file with the City Clerk,

[1]We note that the statement of facts in Moran's brief fails to comply with Rule 13(a)(4), Ariz. R. Civ. App. P., because it does not include "appropriate references to the record." The only citation to the record is a general "supra" referral to a thirty-nine-page deposition. Although we could, as the City requests, strike Moran's statement of facts based on that deficiency, *see Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996), we decline to do so because the pertinent facts are essentially undisputed.

sufficient evidence of a general liability [insurance] policy." The code also stated, "[a] permit shall be immediately revoked upon the cancellation of insurance as required by this ordinance." Under the code, an endorsement was to be included on the required insurance policy, "providing for thirty (30) days notice to the city of any material change or cancellation." And a permittee was required to "immediately notify the City Clerk of any . . . substantial change in equipment or circumstances."

¶4 Blue Sky's insurance expired on December 5, 2004, one month before the accident. On December 23, the City contacted Blue Sky about whether it had current insurance coverage. In response, Blue Sky sent to the City, via facsimile, a "supplemental declarations" sheet indicating its insurance had been extended to January 5, 2005. The City clerk testified in deposition that Blue Sky's principal also had assured her in a telephone conversation on December 23 that he had renewed the insurance coverage beyond January 5, and on January 11 Blue Sky sent the City a Certificate of Liability Insurance purportedly valid through December 5, 2005. It was later determined, however, that the certificate had been falsified. Two days after Moran was injured, and a day before the City received the falsified certificate, the City sent a letter to Blue Sky, cancelling its permit because it had not received proof of insurance.

¶5 In January 2006, Moran filed this action against the City, Blue Sky, its owners, and one of its employees, alleging gross negligence against the City. The City moved for summary judgment. It argued, inter alia, the undisputed facts did not support a

claim of gross negligence.[2] *See* A.R.S. § 12-820.02(A)(5). In response, Moran argued that the City was grossly negligent in failing to immediately revoke Blue Sky's use permit when it learned Blue Sky's insurance had lapsed and that the City "breached its duty of care in a reckless, wanton disregard of the safety of others" by allowing Blue Sky to continue providing horseback rides.

¶6 In granting the City's motion, the trial court stated, "the record is devoid of any evidence to show that the [City's] failing to immediately suspend or terminate" Blue Sky's permit amounted to gross negligence. The court directed entry of judgment in favor of the City pursuant to Rule 54(b), Ariz. R. Civ. P., stating "there is no just reason for delay." Based on that directive, we have jurisdiction of this appeal pursuant to A.R.S. § 12-2101(B). *See Snell v. McCarty*, 130 Ariz. 315, 317, 636 P.2d 93, 95 (1981); *see also Bilke v. State*, 206 Ariz. 462, ¶ 23, 80 P.3d 269, 274 (2003).

Discussion

¶7 Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). "Summary judgment should be granted 'if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the

[2]Although the City also argued Moran had not fully complied with the notice-of-claim statute, A.R.S. § 12-821.01, the City later abandoned that defense.

claim or defense.'" *Armenta v. City of Casa Grande*, 205 Ariz. 367, ¶ 5, 71 P.3d 359, 361 (App. 2003), *quoting Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "[W]e review de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, ¶ 4, 7 P.3d 136, 139 (App. 2000).

¶8 Moran argues the City's "failure to act in removing Blue Sky from its public streets constitutes gross or wanton neglect of its duty to [him]." He contends the City "breached its duty of care in a reckless, wanton disregard of the safety of others" by failing to immediately revoke Blue Sky's permit upon discovering the insurance had expired, in violation of the City code.

¶9 As both parties acknowledge, to avoid summary judgment, the record must reflect triable issues of fact on whether the City was grossly negligent in failing to revoke Blue Sky's permit.[3] Section 12-820.02(A)(5), A.R.S., provides that, absent an intentional tort or gross negligence, a public entity is not liable for "[t]he issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization." A public entity is grossly negligent if it "acts or fails to act when [it] knows or has reason to know facts which would lead a reasonable person to realize that [its] conduct not only creates an unreasonable risk of bodily harm to others but also involves a high probability

[3]Therefore, we need not address the City's alternative argument that summary judgment was also appropriate under an ordinary negligence theory.

that substantial harm will result." *Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 595, 826 P.2d 1217, 1221 (App. 1991). Gross negligence is ordinarily a question of fact for the jury, but we may find as matter of law that a party was not grossly negligent "if the plaintiff fails to produce evidence that is 'more than slight and [that does] not border on conjecture.'" *Armenta*, 205 Ariz. 367, ¶ 21, 71 P.3d at 365, *quoting Walls*, 170 Ariz. at 595, 826 P.2d at 1221 (alteration in *Armenta*); *see also Badia v. City of Casa Grande*, 195 Ariz. 349, ¶ 27, 988 P.2d 134, 141 (App. 1999).

¶10 In urging reversal here, Moran emphasizes the potential danger of horses, claiming the City "exposed [him] and hundreds and possibly even thousands of tourists" to an unreasonable risk of harm when it failed to "pull[] Blue Sky off the streets."[4] But Moran did not contend the City was negligent in allowing Blue Sky to operate in the first place, and as the City points out, the potential harm arising from allowing horses in town "does not change whether Blue Sky had insurance or not." We agree with the trial court that Moran

[4]Moran asks us to "take judicial notice . . . of the potential harm that can strike without notice by a spooked horse from the known incidents that occurred in Tucson during Tucson's Rodeo parades both in 2006 and 2007 in which startled horses stampeded and caused injury and death to innocent bystanders." In order for a fact to be judicially noticed, however, "it must be so notoriously true as not to be subject to reasonable dispute or must be capable of immediate accurate demonstration." *Phelps Dodge Corp. v. Ford*, 68 Ariz. 190, 196, 203 P.2d 633, 638 (1949); *see also* Ariz. R. Evid. 201; *Kengla v. Stewart*, 82 Ariz. 365, 370, 313 P.2d 424, 427 (1957) (court took judicial notice of Tucson's desert climate); *Sw. Freight Lines v. Floyd*, 58 Ariz. 249, 266-67, 119 P.2d 120, 128 (1941) (supreme court took judicial notice of sunset time). We decline Moran's request because the Tucson "incidents" and the behavior of horses are not indisputable facts subject to judicial notice. *See Vigue v. Noyes*, 113 Ariz. 237, 240, 550 P.2d 234, 237 (1976) (horses' propensity to fight and bite each other not indisputable fact subject to judicial notice).

did not establish that permitting Blue Sky to operate its business without insurance created "an unreasonable risk of harm" and that "it was highly probable that harm would result."

¶11 The only evidence Moran proffered below in support of his claim was the City clerk's deposition and two letters by the City revoking Blue Sky's permit after the accident. Neither that scant evidence, nor anything else in the record, presented a triable issue of fact on whether the City knew or had reason to know that substantial harm likely would result from allowing Blue Sky to continue providing horseback rides without having current liability insurance in effect. *See Armenta*, 205 Ariz. 367, ¶¶ 21, 23, 71 P.3d at 365. Therefore, on this record the trial court did not err in concluding that a reasonable person could not find that the City was grossly negligent. *See Walls*, 170 Ariz. at 596, 826 P.2d at 1222.

¶12 In support of his argument, Moran also cites *Rourk v. State*, 170 Ariz. 6, 821 P.2d 273 (App. 1991), arguing "there is a substantial nexus between [it and] the case at bar." But we agree with the City that *Rourk* is materially distinguishable. In that case, a teenage foster child injured in an automobile accident after attending a drinking party sued the state, the Arizona Department of Economic Security (ADES), and her foster parents for negligent supervision. *Id*. at 8, 821 P.2d at 275. The trial court granted partial summary judgment in favor of the state and ADES based on qualified immunity for negligent licensing of the foster parents. *Id*. Division One of this court reversed, however, because the plaintiff presented enough evidence from which a jury could conclude the state "was grossly negligent in

placing [the teenager] in the foster home and in failing to remove her from that home when it knew or should have known that she was not receiving adequate supervision." *Id*. The record in that case supported findings that ADES had knowingly placed a severely depressed teenager with an alcohol problem in a lower-supervision home against a psychologist's recommendation. The state had been notified of several incidents of the foster parents' failure to adequately supervise children in their care. In addition, evidence was presented that the foster father had a drinking problem, and the teenager had been allowed to drink alcohol in the home. *Id*. at 8-9, 13, 821 P.2d at 275-76, 280.

¶13 Unlike *Rourk*, the record here is devoid of any evidence the City knew that the horse was dangerous or that Blue Sky had experienced any prior accidents or problems with their horses. The record similarly lacks evidence that Blue Sky's failure to have liability insurance contributed to the accident in any way. And, as the trial court stated, even if the City had known in December that Blue Sky's insurance had expired, the record contains no evidence from which a reasonable trier of fact could find the City should have known the lack of insurance increased the risk of harm or made it highly probable that harm would result. Nothing in this record could lead a reasonable person to conclude that the City was grossly negligent in failing to revoke Blue Sky's permit before the accident because of its lapse in insurance coverage. *See Armenta*, 205 Ariz. 367, ¶ 23, 71 P.3d at 365; *Badia*, 195 Ariz. 349, ¶ 33, 988 P.2d at 143. Therefore, the court did not err in granting summary judgment in favor of the City.

Disposition

¶14 We affirm the trial court's judgment in favor of the City of Tombstone.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge